

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28

NATIONAL DANCE INSTITUTE - NEW MEXICO, INC

and

Case No. 28-CA-157050

DIANA OROZCO-GARRETT

Charging Party's Reply Brief to  
National Dance Institute – New Mexico's  
Answer to Exceptions to the  
Decision of the Administrative Law Judge

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## The Charging Party Diana Orozco-Garrett presents to the NLRB her Reply Brief to NDI-NM'S Answer to Charging Party's Exceptions to the Decision of the Administrative Law Judge.

**Introduction.** Diana Orozco-Garrett, (hereinafter CP) will in this Reply Brief address those issues raised by National Dance Institute – New Mexico's (hereinafter NDI-NM) Answer to the Charging Party's Exceptions to the ALJ Decision:

1. That NDI-NM's action of placing the CP Party on probation in September of 2014 is not in issue in this case since that matter was fully settled in Case No. 28-CA-136974. (NDI-NM Ans. pp. 2-3)
2. That that ALJ correctly found lack of employer animus. (NDI-NM Ans. pp. 3-5)
3. The ALJ did not find a case of disparate treatment. (NDI-NM Ans. pp. 5-8)
4. The ALJ found that NDI did not produce changing or manufactured evidence. (NDI-NM Ans. pp. 8-11)
5. The ALJ found that NDI's investigation was meaningful and appropriate. (NDI-NM Ans. pp. 11-13)
6. The ALJ found that CP's complaints about management were not protected activity. (NDI-NM Ans. pp. 13-15)
7. The ALJ did not improperly relay on hearsay evidence. (NDI-NM Ans. pp. 15-17)
8. The ALJ found that NDI-NM's conduct policy is not overly broad, and (NDI-NM Ans. pp. 17-19)
9. The ALJ found that NDI-NM met its burden of proof. (NDI-NM Ans. p. 19)

### Argument.

**1. September Probation.** NDI-NM makes a *res judicata* argument that the CP cannot re-litigate in this proceeding the imposition in September 2014 of a school-year probation. They cite *DeSantiago v Laborers International Union, et al.* (914 F. 2d 125, 130 (8<sup>th</sup> Cir. 1990) in support of this proposition. *DeSantiago* is not applicable. The question there was whether a prior NLRB award barred a later federal court proceeding: "... we are unable to conclude that ... plaintiffs ... may proceed with a court action, having already obtained remedy through the NLRB hearing." *DeSantiago*, at 130.

The CP's argument is that the ALJ did not properly consider that the NDI-NM's imposition of probation in September is the background to

a. The series of retaliatory actions by NDI-NM against the CP for filing EEOC and NLRB cases arising out of the grossly unfair and "shock the conscience" method utilized by NDI-NM in that "kangaroo court" proceeding. (See pp. 5-7 of CP's Exceptions to ALJ Decision, hereinafter "CP Exceptions"), and

b. The efforts which the CP had to employ to protect herself from further arbitrary, capricious and summary discipline. (CP Exceptions, pp. 10-13).

## 2. Employer Animus.

a. NDI-NM argues that the original September 2014 probation letter containing the prohibition that CP was “not to discuss this matter with any NDI New Mexico or Santa Fe Public School Staff” is both *res judicata* and not proof of employer animus. (Answer P. 3). The *res judicata* argument is misplaced as stated above. The prohibition of discussing disciplinary action with fellow employees tears at the heart of NLRA protection of concerted activity. And the admission by NDI-NM (Answer p. 4) that the prohibited language of being an “ambassador” for NDI, found in R. Exh. UU, dated July 23, 2010, was maintained in her personnel file can only be explained by employer animus, especially since that memo was used against CP as grounds for her eventual termination in September 2015.

b. NDI-NM asserts that it did not use the “Standard of Professional Policy” against her. (Answer p. 4). They did exactly that.

1). As admitted by NDI-NM (Answer p. 18), Supervisor Salganek referred to these standards in threatening to refer CP to the Executive Director Baker. R. Exh. U, July 31, 2015), and

2). Executive Directory Baker utilized the Standards of Professional Conduct in formulating his decision to terminate CP. (R. Exh. A and BB).

c. NDI-NM now claims that it had grounds for asserting that the CP had misused petty cash. (Answer p. 5). There is not one scintilla of evidence in the record to establish these “grounds.” The fact that the allegation was made in public, and retracted upon challenge, is sufficient to demonstrate a pattern of continued employer animus. (Exceptions, p. 8, referring to CG Exh. 28, p. 15, item 9).

## 3. Disparate Treatment.

a. Credibility. NDI-NM does not address in a coherent manner the ALJ’s reliance upon Executive Director Baker’s credibility, or lack thereof. They do not deny that Baker lied to CP about his possession of substantial information about the “injury incident.” Exceptions, p. 9.<sup>1</sup>

NDI-NM cites *NLRB v Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) for the proposition that the ALJ’s evaluation of witness credibility should not be lightly overturned. But *Walton* specifically holds that the “employer’s statement under oath must be believed unless there is ‘impeachment of him’ or ‘substantial contradiction’ ...” *Walton* at 408.

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<sup>1</sup> The impeaching exhibits listed on page 9 of CP’s Objections were not available to the CP until the morning of trial in December 2015. These documents were contained in a massive, multiple boxes containing a couple of thousand pages, “document dump” delivered to the General Counsel at 9:00 AM. The fact that the ALJ allowed this grossly unfair response to discovery, and the fact that the GC did not demand a postponement to evaluate the legal significance of this dump speaks to the unfairness of the proceeding to the CP.

The CP pointed out to the ALJ in her post trial brief that Baker had lied to her. CP's Post Trial Brief, p. 4. The ALJ did not discuss or evaluate Baker's lies. A decision that upholds credibility is not worthy of affirmation if the bases for that evaluation are so significantly lacking as they are here.

b. Waiver of State law requirement of reporting. NDI-NM asserts that the CP waived her claim that NDI was obligated under New Mexico state law to report to law enforcement the alleged injury to a child. NMSA, Sec. 32A-4-3. They cite *Local 594, UAW v NLRB*, 776 F.2d 1310, 1314 (6<sup>th</sup> Cir. 1985). This case stands for the proposition that if a union failed to raise the issue of exhaustion of internal appeals in its defense against employee claims before the ALJ, then that issue is waived. *Local 594*, at 1314. The CP's claim is that NDI-NM failed to follow state law: no credence should be given to their claim of neglect to raise a procedural issue regarding exhaustion. Her argument is that NDI-NM's belief in the truth of the injury allegation is not believable (it lacks credibility) if they failed to act in accord with the state law mandatory reporting statute.

c. Refusal of CP to meet with Director Baker. Both the ALJ in her division (Decision 19:19-22) and NDI-NM (Answer, p.8) continue to state that the CP refused to meet with Baker during his "investigation." It is uncontradicted that the CP continually offered to meet with Baker. On July 9th, Baker accused Orozco-Garrett of refusing to meet with him. Exh. R-T. On July 13th, she told Baker that she had never refused to meet with him; that she had offered to meet with him in emails dated May 28, June 2 and June 22. She reiterated her request for the factual basis of any allegation against her. Exh. GC-16. The ALJ absolutely ignored these repeated attempts of the CP to meet if Baker had supplied her with relevant information.

#### **4. Changing or Manufactured Evidence.**

The CP's arguments are fully laid out her Objections, pp. 12-15.

NDI-NM again cites *Walton Mfg. Co.*, 369 US 404, 408 (1962), (see discussion above at p. 5) and adds a citation to *Medina General Operations v. NLRB*, 394 F.3d, 202, 217 (4<sup>th</sup> Cir. 2005), which is irrelevant to the charge of manufactured evidence.

The ALJ decision fails to discuss and evaluate how NDI-NM's allegations changed over time from alleging the CP made "unkind" statements about Supervisor Lowman to "F-this and F-that." (Objections, p. 14-15)<sup>2</sup>

And the ALJ decision fails to discuss the deliberate withholding of "witness statements" from the CP by Baker. (Objections, p. 9). See also footnote 1, *supra*.

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<sup>2</sup> The ALJ utterly fails to discuss the alleged used of workplace profanity in accord with the factors set out in *Atlantic Steel Co.*, 245 NLRB 814 (1979). Additionally, the ALJ did not discuss the how the alleged use of workplace profanity impeded upon management's ability to "maintain production or discipline or otherwise prevent the disruption of ... operations." *Firestone Tire, et al.* 228 NLRB 1323 (1978) citing *SW Bell Tel.* 200 NLRB 667 (1972). In fact, the evidence was contrary: "NDI did not receive complaints from parents or students about Orozco-Garrett's [alleged] language." ALJ Decision, p. 12, 17-18, quoting Transcript, p 179.

Finally, the ALJ's reliance upon Carpenter's testimony, Decision p. 9, ll. 16-38, and Decision p. 21, ll. 4-9, is without adequate foundation. The vast discrepancy between Carpenter's initial complaint to NDI-NM management and her testimony at trial ("unkind statements" vs. "F-this & F-that") cannot be reconciled with Carpenter's statement at trial that her initial complaint "accurately reflects what you recall?" Witness: "Absolutely." Transcript, p 691, ll. 1-8.

## **5. Lack of Meaningful and Appropriate Investigation.**

Although NDI-NM continues to stand by their "investigation," neither they nor the ALJ discuss or evaluate the CP's complaint that the internal investigation arising out of the September 2014 probation was a sham. Neither NDI-NM nor the ALJ even mention that the NDI-NM investigator Wolfe did not interview the CP's proffered witnesses, much less discuss the "kangaroo court" nature of the probationary meeting. CP Objections, pp. 15-16.

Neither NDI-NM nor the ALJ discuss or evaluate the CP's second internal complaint, filed October 13, 2014, (referenced in GC Exh 24), which was never even acknowledged by NDI-NM.

Neither NDI-NM nor the ALJ discuss or evaluate the CP's 3<sup>rd</sup> internal complaint filed August 31, 2015. CG Exh.24.

And finally neither took into account the scenario laid out in the CP's Objections, pp. 10-15, regarding changing allegations and lying to CP.

## **6. Concerted Activity.**

NDI-NM argues that the CP's complaint about a last minute change in a dance performance was not protected concerted activity, ignoring the fact that this change affected the work of all of the dance teachers who had been preparing the students for a certain dance in a performance. Answer P. 13. The ALJ does not discuss this complaint. It is irrelevant whether other teachers agreed with the complaint. Contrary to NDI-NM's cite of *G&W Electric Supply*, 154 NLRB 1136, 1137 (1965), the ruling there is that if the activity is "close enough in kind and character, and bears such a reasonable connection to matters affecting the interests of employees *qua* employees,"... then it comes ... "within the reach of 'mutual aid and protection' the statutes is concerned to protect." A fellow employee does not have to accept an employee's invitation to group action for the invitation itself to be "concerted" within the meaning of Section 7. *Circle K Corporation and Moneagle*, 305 NLRB 932, 933 (1986).

NDI-NM continues to characterize the CP's complaint as concerning artistic choices about "NDI's product," as did the ALJ (Decision, 15:11-14). That is misdirection. And cases cited by NDI-NM, *Riverbay Corp.*, 341 NLRB 255, 257 (2004), and *Lutheran Social Service of Minnesota*, 250 NLRB 35, 41 (1980) are not about "product," rather the negation of employee rights to affect board elections, and employee

carping, respectively. However, Lutheran Social Services recognizes that the filing of grievances is protected. *Lutheran*, at 41.

## **7. Reliance on Hearsay Evidence.**

It is clear from the ALJ decision that she relied on hearsay evidence in the “injury incident.” As pointed out in the CP’s Objections, p. 17, the Rule 803(6) business records exception is no safe-harbor. The “corroboration” requirement is not met. NDI-NM cites *McClatchy Newspapers d/b/a Fresno Bee, et al.*, 337 NLRB 1161, 1182 (2002) for the proposition that NDI-NM needed only a good faith belief that the allegations against the CP were true in order to justify termination. In *Fresno Bee*, at 1182, the corroborating evidence was that the supervisor had witnessed the employee’s intoxication and subsequent injury: direct testimony by an eye-witness. In this case at trial, NDI-NM relied exclusively upon hearsay and double hearsay. They did not produce an eye witness, either by deposition or by live testimony. They did not even bother to produce a written statement from the alleged injured school employee.

## **8. Overly Broad Policy.**

In his testimony at trial, Baker stated that Orozco-Garrett was terminated for being in violation of both the March 2015 and the September 2015 Employee Handbook. Tr. p 173, l. 14 to p 174, l. 4. He cited standards of “excellence” and a standard of “good judgment” as being those which Orozco-Garrett supposedly violated. Tr. p 176-177, p 205, ll. 1-20. “Excellence” is a core value; “good judgment” is a part of office etiquette. These so-called standards are so overly broad as to be meaningless. Although the ALJ found that the language of the Handbook was not overly broad, ALJ Decision, p. 22, ll. 21-22, she did not make a specific finding that the standards of “excellence” and “good judgment” are or are not overly broad.

Contrary to NDI-NM’s claim that “core values” and “office etiquette” were not raised at the hearing as justification for the ALJ not discussing or evaluating them in terms of whether or not they are overly broad, their argument is belied by Baker’s testimony cited in the above paragraph. NDI-NM’s citation of *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 116 (DC Cir. 1996) and *Local 594 UAW v. NLRB*, 776 F.2d 1310, 1314 (6th Cir. 1985) and *Union Electric Co.* 196 NLRB 830, 837 n. 34 (1972) are irrelevant.

NDI-NM finally tries to link its argument that “excellence” and “good judgment” are not overly broad when read in context of requirements of not interfering with NDI-NM’s operations. Answer, p. 18. It cites *Copper River of Boiling Springs, LLC. et al.* 360 NLRB No. 60 (2014) as supportive of this proposition. The rule in *Copper River* proscribed “insubordination of a manager or lack of respect and cooperation with fellow employees or guests and stated that this includes displaying a negative attitude that is disruptive to other staff and has a negative impact on guests.” *Copper River*, at 60, n. 2. Problematic as

this is for a standard of conduct, it is a far cry from “excellence” and “good judgment,” which was cited by Baker as his reason for terminating the CP.

These “standards” are so overly-broad as to be as meaningless. No discernable specificity is available as to conduct which could conceivably give rise to discipline or termination. No rational person could consider these “standards of behavior” as sufficiently specific to give fair notice of the conduct that is proscribed. Yet the ALJ decision fails to discuss or analyze these standards.

## **9. Burden of Proof.**

The CP relies upon the arguments in her Objections. P. 21-22. NDI-NM added nothing new or persuasive in its Answer, p 19.

**Prayer.** Orozco-Garrett, the Charging Party, requests that the NLRB reject the opinion of the ALJ and find that NDI committed the alleged unfair labor practices and order an appropriate remedy, including a cease and desist order, notice to employees, rescission of the overly broad and discriminatory employee conduct rules, rescission of her discharge and back pay and reinstatement, and any other remedy to which she may be entitled.

Respectfully submitted,

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Charging Party

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was delivered electronically to Patricia Salazar Ives, attorney for NDI-NM, and to Cristobal Munoz, General Counsel for the NLRB, on this 3rd day of May, 2016.

/s/ Diana M. Orozco-Garrett